

# LAW AND NATURE

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## CHAPTER ONE

# INTRODUCTION: THE PRAGMATICS OF NATURE AND THE SITUATION OF LAW

Wilderness, animals, bodies, and brains. Rivers, oceans, endangered species. Pets. Laboratory monkeys, dancing bears, and killer bees. Sperm. Conception, gestation, lactation. Breeding. Giving birth. Genes, chromosomes, and hormones. Lust. Sodium, potassium, electromagnetism, and sexuality. Hurricanes and neurotransmitters. Corn. Iron. Oxygen, nicotine, and blood. Northern white pines, schizophrenia, comets, and death. Black raspberries and instincts. That fish, this urge, these symptoms, those asteroids. Nature.

There is, in the world that humans have created, the concept “nature.” There is also in Western culture a range of more specific conceptions of nature – theological, scientific, philosophical, and common. Then there are the things, places, or events *in and of* the world to which the designations “nature” or “natural” are applied or from which they are withheld. One element that appears to hold many of these together has to do with that which they are not. Distinguished from nature in many conceptions are those critical aspects of humanness – consciousness, intentionality, culture, knowledge, and so forth – which, if not regarded as unnatural, are generally considered to be of such a radically different ontological status as to justify a basic distinction in kind between the human and the natural, between humans and other animals or life forms, between bodies and minds, and, more specifically, between brains as matter and mind as, well, something else. Collingwood, in his *The Idea of Nature*, put it like this, “According to Galileo, whose views on this subject were adopted by Descartes and Locke and became what may be called the orthodoxy of the seventeenth century, minds form

a class of beings outside of nature” (1945, 103). More recently Daniel Dennett described Cartesian dualism as “the idea that minds (unlike brains) are composed of stuff that is exempt from the laws of physical nature” (1984, 28).

Humans, though, have trouble with nature – the stuff of the world we call nature *and* the concept itself. A slice of a hill slope slips and buries some houses; a dam is built which threatens a species of fish with extinction; monkeys are liberated from a laboratory; a woman is arrested for committing “the abominable and detestable crime against nature” with a dog; a man is arrested for committing the same crime with a female human being; a woman who had agreed to “carry” a fertilized egg for another woman wants to back out of the deal as the gestation approaches term; a prisoner is injected with a drug that makes him vomit uncontrollably; another prisoner is given, against his will, a drug that will, in the words of Supreme Court Justice Anthony Kennedy, help him to “organize his thought process and regain a rational state of mind” (*Washington v. Harper*, 494 US 210, 1990, 214); a hitchhiker charged with murder answers with a defense of “homosexual panic.” This defense posits an unconscious and uncontrollable “fight or flight” response in latent homosexuals when confronted with the possibility of self-recognition; a woman charged with murdering her infant answers with a defense of postpartum depression brought on by a hormonal imbalance; another mother requests that life support systems be removed from her comatose daughter so that “nature can be allowed to take its course.” Humans have lots of trouble with nature, and lots of trouble with each other over nature, including what counts as “nature” in a given situation.

We argue about nature and, in our culture, we often ask courts to respond to our arguments. We ask law to make the crucial determinations and distinctions. We ask judges to trace the demarcations between “human” and “nature” through totality, animality, and corporeality. We ask them to sever conceptually (or connect) mind and brain, self and body, human beings and animals, and humanity per se and the rest of everything. In a given case a judge may be called upon to authorize one version of nature over others, one conception of the root distinction over others, one vision of what it is to be human (or not) over other plausible visions. Out of disputes such as these there emerges a range of powerful images and representations of what it means to be human in our world. It might be noted that this world – our world – has been

described as both “postnatural” and “posthuman.” In any case, it is a world in which the distinction between these two most basic terms of modern thought is itself a topic of often fierce debate. And this causes problems for law. Moreover, these images and representations are not inert. They may play a crucial role in justifications of or challenges to the circulation of physical force or violence in the world.

This work addresses the following lines of inquiry: first, what does law say about nature? This is to ask not simply what law says nature *is* but what the concept “nature” *does* in legal descriptions of events in the world. What does nature signify? Essence? Permanence? Absence? Order? Disorder? How do these themes work to create meaning in arguments and judgments? Second, what does what law says about nature tell us about the legal construction of figurations of the human? What are we that nature is not? What are we that is not “natural”? What does it mean to ask such a question? Part of this line of inquiry involves looking at different kinds of relationships across the ontological gap and examining the role of “limits” in legal stories about humans and nature. As the list of contexts above suggests, the role of nature in limiting ascriptions of “control” or responsibility is of great significance. But this is complicated by the fact that the category “human” can in a given situation be filled by a host of more specific figurations. It can refer to humanity per se – or humankind, “man,” civilization, etc., to generic or specific individual human subjects or to the personifications of intermediate or institutional actors such as “science” or “law.” We might then ask: what happens when discrepant or competing figures of the human confront each other in law? What happens when, for example, the claims of the human as identified with the free, autonomous individual are countered by the claims of humanity as such? A third line of inquiry looks into what law says about the relationship between nature and humans can tell us about law itself as a humanistic endeavor. Finally, this work asks how answering these questions might illuminate understandings of elements of the material world – landscapes, other species, bodies – that are the *objects* of interpretation.

## PICTURING NATURE IN LAW

Consider the following illustration (which, I should say, was chosen not for the purposes of sensationalism but for the way it encapsulates many of the themes of the book). Louis Guglielmi was convicted of violating

a federal statute that prohibits sending obscene materials through the mail. One of the ways in which judges have domesticated the various and famously unwieldy meanings of “obscene” is to hold that obscenity is as follows: “to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interests” (*Roth v. US*, 354 US 476, 1957, 489). Among the offensive materials seized by postal inspectors was a film the court identified by name as *Snake Fuckers* (*Guglielmi v. US*, 819 F 2d 451). (According to Judge Clement Haynsworth, though, the animal appeared to be an eel.) Guglielmi attempted to have his conviction overturned – and, therefore, his sentence vacated – in part on the basis of the claim advanced by his attorney, Alan Dershowitz, that the materials in question were so vile and depraved that they could not possibly appeal to *anyone’s* prurient interests. Though Haynsworth did find the attorney’s arguments to be “not without ingenuity” (452), it should occasion little surprise that the judges of the Fourth Circuit Court of Appeals did not find them compelling. We might say, though, that, given the stakes, there was little harm in trying.

So, consider: once, at least, a woman was filmed having sex – whatever that is – with an eel. While sex between humans and nonhuman animals is, it would seem, necessarily sex without reproduction, here people engaged in social practices involving bestiality specifically for the purposes of reproduction – at least at the level of representation. These reproduced representations were then put into broader circulation and when those circuits broke down Guglielmi was arrested, tried, convicted, and sentenced. As a result of Dershowitz’s failure to reframe these events and practices convincingly, Guglielmi’s sentence of twenty-five years in prison was allowed to stand. His body, we might say, was repositioned within a particular circuit of physical force associated with the law.

We might see the depicted events – and the countless other similar events – as being principally *about* hatred of women. Moreover, the practices themselves presuppose a market in which participants exchange money for commodities that give misogyny a particularly vivid and visceral occasion for expression. That the other “participant” – in the sex, not the market transaction – was an animal, and one rather low on the cultural hierarchy of animals, precisely facilitates this semiotics of degradation. But this case, the factual events, and their rendering in law might also be understood as being about the regulation of bodies or about state control over what we can do with our bodies. Most

immediately it might concern what we can do with our eyes, but necessarily what we can and cannot do with our sexual bodies. It can be understood in terms of the regulation of eroticism and sex. Additionally, it can be understood as concerning what we can and cannot do with animals. Judge Haynsworth noted that the scene following the one depicting bestiality showed people engaging in oral sex while, in the background, the eel, now chopped into pieces, sizzled in a frying pan on the stove. If the film had been about “snake eaters” Louis Guglielmi would not be facing a quarter century in prison.

Bodies, sexuality, reproduction, and animals are all made intelligible in our culture by drawing on various aspects of the concept “nature.” I will return to this in a moment. First I want to draw attention to another reading of “nature” at work in Dershowitz’s attempted reframing. Another part of his argument alluded to “zoophilia” and “zoophiliacs.” Zoophilia is a specialized locution for what is more generally referred to as “bestiality” and more colloquially called “buggery.” To call it zoophilia is to recast it in the terms provided by the sciences of psychology and psychiatry. It is to medicalize it, to cast it as a psychological condition over which one has little or no control. (I should note, though, that this was not Dershowitz’s explicit argument. His argument was that the images could not even have appealed to “the average zoophile” because there is no “average” zoophile. Each is special in his or her own way.)

Not very long ago, only yesterday, actually, the event cinematically reproduced in *Snake Fuckers* would have been an instance of “the abominable and detestable crime against nature,” and, if possible, prosecuted as such. Now it is at least *conceivable* to portray it not as sin but as illness, more like diabetes or cystic fibrosis; less like lying or stealing. Not, that is, as a crime *against* nature, but as an expression *of* nature. We might take this fact alone as suggesting either a historical shift in what sorts of things we want to use “nature” for in helping us make sense of the world, or as expressing aspects of ambiguity that are simply built into the concept. Not long ago, I might add, it would have been at least as inconceivable for a judge to refer explicitly to and discuss something like *Snake Fuckers* in the pages of the Federal Reports.

In considering this case we might also consider the webs or layers of representation that are implicit in my telling of the tale. The event itself was captured and reproduced in representational form available for countless repetitions; these representations themselves being represented in a legal brief as so depraved as to be beyond the merely pornographic; that representation, in turn, being represented as a feeble legal



argument in a volume of the Federal Reports; and *that* representation being represented here – in this very sentence – as a sort of skeleton key to understanding significant cultural practices. I want to use it, and other cases at once vastly different but interestingly similar, as windows on how the world of experience is made meaningful by situated actors in difficult situations. I also want to examine how the particular meanings that are made enter into authoritative justifications for channeling the physical force of the organized state through the material world; for example, through or away from human bodies, in the case at hand, Louis Guglielmi's. At the most basic level, that is what this book is about.

Consider this cultural artifact, the document titled *Guglielmi v. United States*, with its unique identifying code – 819 F 2d 451. This official text was authored by a state actor for an important public purpose. We might look at it as a cultural artifact the way that the archeologists who unearthed what turned out to be the Code of Hammurabi might have regarded the tablets etched with cuneiform markings. What do we make of it? What might we want to ask of it? Once the code is broken we might see it as an expression of the effort to make sense of the world or, at least, of a moment of worldly reality. We might come to see it as an effort to make a particularly *legal* kind of sense of events; to situate the events within webs of legal meaning and, in the act of so situating them, render them legally meaningful. In our turn, we can try to make sense of these efforts to make sense. We can take the arguments apart in various ways, examine their presuppositions, see how their metaphorical structures work, and explore their use of images or other rhetorical resources. We can recontextualize them this way and that, and put them back together to look at them in new ways. We can see what these sorts of sense-making – and world-making – practices can tell us about the culture for whom these are highly significant and powerful practices. And because the culture in question is not Babylonia but ours – is “us” – then perhaps making sense of how we make sense in these contexts might give us some insight into how, *practically speaking*, we go about making ourselves meaningful. As I will be discussing in some detail, two of the most significant tools we have for doing this are “nature” and “law.” Each of these course through the Guglielmi story in a number of ways.

Nature and law are commonly construed as antithetical to each other. In later chapters I shall argue that the relationship is more complex than one of simple opposition. Nevertheless, to the extent that they can be construed as opposing and not simply different it is because each

draws on a similar underlying conceptual structure concerning matter and mind or world and word, but in opposing ways. “Nature” is a collection of categories, concepts, images, and tropes through which physicality is rendered meaningful. But if nature *refers* to physicality, its discursivity and the cultural-cognitive processes of *referring* are commonly elided. In dominant, realist framings nature is not a contingent way of ordering the world, it *is* the world. It is the name for an unmediated reality and the process of naming is itself inert. Nature is natural. With law, on the other hand, we frequently encounter an opposing evasion. Law is commonly associated with meaning, rules, interpretations, categories, lines of reasoning, texts, and words. In discussions of law its physicality – its presence and work in and among the world of things – is usually passed over. Although exploring the discursivity of nature and the physicality of law are preliminary moves, it is not my aim simply to flip the terms of the supposed antithesis. Rather, I want to follow some of the unfoldings that may occur when we dissociate the nature/law antithesis from the matter/mind or world/word dichotomies. In particular, I look at how a range of nature stories work to channel the force of law in the material world; how, through the institutional practices and projects of law, meanings are transformed into vectors of physical force and how these, in turn, effect other material transformations. They may change what the world is like and what it’s like to be in the world. “Nature” is a fundamental cultural resource for doing this kind of work, and law is a no less fundamental site of its deployment. One place in the world among many in which this encounter is staged is Guglielmi’s body. Another may be your body. Another may be the landscape in which you find yourself.

## OTHER NATURE STORIES

Now consider this. Here is a woman undergoing amniocentesis in her obstetrician’s office. She is uncomfortable. She is anxious. She has been told that there is a greater than average possibility that the fetus she is carrying may have cystic fibrosis. She tries to focus her attention on the bright colors of a poster showing a cluster of hot-air balloons floating over a desert landscape. And this: here is a trio of old friends on the second morning of a five-day backpacking trip into a wilderness area. They have come upon the base camp of an exploration party working for a natural gas company. They regard the workers as trespassers, as violators. They themselves feel violated. And this: here is an inmate

of a facility for the criminally insane. He struggles as he is physically restrained. An orderly injects him with Prolixin, a psychoactive drug prescribed to treat the symptoms of schizophrenia. He has testified that he would rather die than be subjected to the effects of the drug. And this: here is a Hawaiian palila bird, a small finch found only on the western slopes of Mauna Kea. It lives on the seeds of the mamane tree. But here also is a flock of sheep. They were brought to the slopes to provide Euro-Americans with something to hunt in a land without large mammals. The sheep eat the mamane seedlings which causes a sharp drop in seed production. This radically diminishes the palila's habitat, which sharply reduces the rate of reproduction which, in turn, pushes the species significantly closer to extinction.

As vastly different as these situations are from each other they do share important elements. They are, in a sense, instances of a more general state of affairs. They all concern – *or can easily be construed as concerning* – “nature,” the nature/human distinction, and the relationship between what we call nature and the distinctively human. Each situation also potentially calls us to confront the question: what does it mean to be human? Each situation involves as well some sort of “penetration” of the natural by the human. Finally, each of them will become the ground out of which a legal case will emerge.

And here are other situations. A judge is writing a dissenting opinion in the endangered species case. A scholar is writing an essay on the social and ethical consequences of prenatal genetic testing. An activist is updating his website on zoophilia as a form of cruelty to animals. You, the reader, are beginning to read this book. All of these situations presuppose the possibility of meaning. Some of them are related to the first set of situations in that they take them as objects of interpretation, topics to be made meaningful one way or another. All of these are particular instances of what I will rather grandly (or, perhaps, blandly) call “the general situation of being” or human existence at a particular historical moment within a particular cultural configuration called by many “modernity,” broadly speaking: here and now. The situation concerns how sense is made.

In the remainder of this chapter I want to do two things. First, I want to sketch out, in general terms, the terrain that this book will cover, the issues raised, the perspective from which they are raised and the importance of raising them. Second, I will provide an outline of how the exploration will proceed, what the various sections and subsections are about, what I want them to do, and where we should end up if you decide

to follow the whole way. I am ultimately (and deeply) concerned with what we might call “concrete particulars” such as the situations alluded to above, and I will return over and over to them as points of reference and as events to be understood in rather practical terms. However, in the following sections I will be beginning the exploration of “Law’s Nature” in a deliberately abstract way. One reason for this is that, as I will argue, part of what both “nature” – that is, prevailing conceptions of nature – and law *do*, part of what they accomplish, is the practical rendering of a vast array of situations as being in important ways “the same” precisely through their power to sustain abstractness. If we want to know how “nature” works and how it does what it does in and through legal practice we have to address this power of abstractness. Another reason for beginning in this way is to provide some larger frames of reference for interpreting specific events.

## MAKING SENSE OF THINGS

There are countless ways of describing “the general situation.” Philosophers, theologians, comedians, and others take this as their primary calling. From what might be called a general phenomenological or existential or pragmatic point of view, the place to begin is with the notion that human existence is primarily experienced; it is primarily *lived* in engagement with the world. As the preceding vignettes suggest, my aim is to say something about this. There are, though, countless plausible ways to grasp reality, to carve it up and put it back together. I want to examine rather closely how – as a *practical* matter – the carving is done and how the pieces are all connected, disconnected, and reconnected as people try to make sense of the world and themselves. For that, ultimately and practically, is what “nature” is all about.

Let us start with us, you and me. We are physical beings who inhabit a material world. We are embodied, sensual, and perceptive. We were born, will die, be ill and in pain, be well and age. This is no news. As we inhabit the world, the extracorporeal world, it inhabits us. We act in and on the physical world. We do things to it and transform what we encounter ceaselessly. In so doing, we transform ourselves. But we are also, we are pleased to believe, more or other than that; more and other than moss, dung beetles, or caribou. We are also cultural beings, conscious beings, signifying beings. We inhabit a universe of meanings. Likewise, a universe of meanings inhabits each of us. It does so through language: semantics, categories, concepts, grammatical forms,

and through the beliefs, ways of being, of doing, of seeing ourselves and the world – and ourselves in the world – that language gives form and content to. Just as we engage in transformative actions with the material world we also engage in mundane and profound ways with the universe of meaning. We cannot not do so. We make sense of ourselves. We are what we mean. These two aspects of our situation, physicality and signification, are not and cannot be separate, but they are not identical.

As we work *on* meaning, we may work it *into* the material world by naming, projecting, or inscribing. As we do, we transform that world, and as we do that, we may transform ourselves and our social situations. Consider, for example, the material and experiential transformations effected by changes in concepts such as “woman” or “race,” “property” or “punishment.” We *give* meaning to the world of things and events and then we *take* it back to become meaningful to ourselves. These activities of “giving” and “taking” can be profoundly powerful acts, depending on the specifics of the situation. It is perhaps a truism to say that a world devoid of meaning is literally unintelligible. We should remember, though, that it is not just the *idea* of such a world that would be unintelligible, but the world itself. Ground would be indistinguishable from sky, hand from rock.

In the culture under examination – ours – one of the most fundamental devices for conferring meaning onto the material world and ourselves is “organized,” so to speak, around a complex cluster of concepts, images, values, and ideologies that is centered on “nature.” Speaking most generally, the core feature of prevailing conceptions of “nature” is that it divides the totality into two domains: the domain of nature and the domain of the human. Nature itself most often signifies physicality, while the human is somehow other than or irreducible to the physical. The concept “nature” pries these apart and opens up a space for being distinctively human – or, to shift axes, “nature” provides a background against which “the human” can emerge as a meaningful figure (just as darkness provides the ground against which starlight is discernible). As we will see later, the cultural domain of the legal is one of the more important sites in which this prying apart or figuring is done. If “nature” is used to make aspects of physical reality meaningful in complex but particular ways, it is also, and simultaneously, used to make us meaningful as other than “mere” nature or “brute physicality.” The difference that it makes makes us other and more than animals, other and more than simply a collection of bodies. The significance of this cannot be

overestimated. Perhaps we need “nature” and we need to “naturalize” the way a stream “needs” its banks or a figure “needs” a background. We need nature the way that good “needs” evil. It is a simple question of contrastive definition.

Consider the horror that is almost definitionally part of any effort to “dehumanize” a person or group of people. Consider the revulsion we experience when, for example, women, or Blacks, or prisoners or anyone are, as we say, being “treated like animals.” One word we have for making sense of such events is to say that the perpetrators are themselves “inhuman.” Now consider how most of us probably feel when an animal, say a monkey in a laboratory or a pig in a slaughterhouse or a fox in a hunt, is being “treated like an animal.” A word we might use here is “inhumane.” But all the difference in the world separates the inhuman from the “merely” inhumane. Nature, and the constitutive opposites of nature, make the sorts of beings we are meaningful to ourselves. They also make particular beings within – and without – the category “human” meaningful. Whatever else “nature” means, and, as we shall see, it is an awful lot, to be human is to be radically distinct from nature. Wouldn’t our world be radically different if most of us believed otherwise? Imagine a world very much like our own except that the collection of entities such as earthquakes, forests, bees, magnesium, schizophrenia, and testosterone were not all obviously intelligible with reference to one concept: “nature.” Could it even be a world “very much like our own”?

A human infant is born. It is, in obvious ways, a slab of stuff, matter. It is the material product of causal, physical processes. It is, itself, a discrete bundle of processes operating at the atomic, cellular, and metabolic levels. It is also a meaningful entity. It is, for example, a person. It is a “she.” Much of the meaning that makes her intelligible as more or other than mere stuff is social not just in origin, but works to position her with respect to the meaningful social-relational webs into which she has emerged. She is a child of parents, she may have been born with a name – Baby Girl Delaney. She is also a citizen, a bearer of rights, an heir. She may be a patient. If she was born in a hospital she has an institutional presence as a medical record number, a file. She may be understood as having been born into a religion. She was born “raced,” and the iconography of race is inscribed on the legal documents attesting to her presence among the living. She may be loved. While different aspects of her being can be pragmatically foregrounded, backgrounded, or ignored in analysis, ultimately they cannot be left aside. As with her, so with the world into which she is born.

Now, imagine that that infant was the product – the embodiment of the specific performance of – a surrogacy contract such as was at issue in the famous Baby M case. Imagine, then, that there was a dispute about social relational meaning: whose child is she? what is her name? Imagine that there is trouble. Or imagine that that infant was born with Tay-Sachs disease after genetic screening had indicated – and an obstetrician had given confident assurance – that she would not be. The meaning of the event, the meaning of her being, her life, might well be very different. In this situation materiality (and what we make of it) may be given greater prominence. Or imagine six months earlier. She, or it, was a very different sort of legal entity, a first trimester fetus. Legal personhood had not yet attached to material stuff. By convention, not a she but a conceptus; and, of course, the convention here is very much contested.

The point is simply that we do not encounter “the situation” in general. Nor is “encounter” quite the right notion if that carries the suggestion of coming to it from elsewhere. We are always in “the general situation” but continually encounter it, practically, experientially, and specifically in the flow of time. Most often, for most of us nearly always, whatever situation we find ourselves in unquestionably makes sense. But sometimes, perhaps when there is trouble or perhaps when we encounter radical novelty, “sense” has to be made. And occasionally what we sense is that sense cannot be made, or at least not easily. What to do? One might pray, another might get drunk, one might fly into a rage, another might plunge into despair, one might write, another might call a lawyer.

## MAKING SENSE WITH NATURE

As I have been arguing, one of the most basic cultural devices for making the material world meaningful is the complex cluster of notions that is centered on the concept “nature.” Or, perhaps it is more accurate to say that it is centered on the edge of “nature,” where nature is distinguished, or carved off, from something else such as the human, the social, the mental, the cultural, or the artificial, or the normative, or any of the other things commonly contrasted with “the natural.” We use “nature” in countless ways to make sense of the world, to make it and ourselves meaningful in particular ways. We use it to situate ourselves within and in relation to the world. We tell nature stories. We talk about forces of nature or the environment. We talk about animals and how we are like and unlike them. We talk about bodies, health, medicine, death, fate,

and responsibility. We talk about science, sex, genetics, crime, pollution, food, and depression. But “nature” regarded as a cultural, historical artifact is unwieldy. In a sense, it is wild. We use it, that is, to control how these things are understood. We draw lines. But “nature” itself, the very idea, can itself spin out of control. We use it to make some aspect of reality more determinate, but it is itself, in many ways, deeply indeterminate, open or vulnerable to conflicting interpretations. We use it to simplify, but it is too complex. This is a theme I want to explore in greater detail.

Nature is polysemous – it means too many things; it is ambiguous – it is radically context-dependent and contingent on perspective. We use it to refer to galaxies and hummingbirds, to sexuality and family structure, to behaviors and wilderness, to ice cream and morality, to talents and disasters. In some ways it is incoherent. It can be used to signify order and disorder, determinacy and indeterminacy. Beyond that, we can pour into the category a range of vastly competing values or normative commitments. It can name both what we want to overcome or escape and what we need to respect, stay within, or aspire to. If nature is ambiguous, shifting, and unstable – at least when looked at across a range of applications – then so must be the various distinctions that it marks, the meanings that it imparts to the world, and the meanings of those entities with which it is commonly contrasted or opposed. That is, if one of the principal tasks of “nature” is to give meaning to the concepts and categories through which, by way of differentiation, “the human” (“humanity”; “humanness”) is understood, then these cannot be less multiple, ambiguous, unstable, and, perhaps, incoherent. This is the worry.

This may also be seen as part of the general situation. Indeed, one of the ways that some philosophers have drawn the line between nature and human – that is, one of the characteristics according to which human distinctiveness is commonly identified – is by saying that what it means to be human is always a problem for us. We are the beings, and, it is asserted, the only beings, who are a problem, a puzzle, to ourselves. One common way of posing the problem is to ask: how *are* we to be distinguished from the rest of totality? Why *it* is a problem is that while we might *imagine* that we are not different after all, it is perhaps hard to *believe* that we are not (not least because in most construals of the difference we are the only beings capable of belief). We find it hard or exceedingly unappealing to believe that we are simply slabs of matter arranged in a particular way.



Now, this might be simply a metaphysical problem of interest only to those with a taste for philosophical or theological speculation. As a practical matter, one might say, such puzzles are inconsequential. We get on with our daily lives and projects. The world simply *does* make sense and, in an everyday sort of way, “nature” is quite serviceable in helping us make sense. Indeed, probably we don’t feel as though “we” are *making* sense at all. Reality simply *is* intelligible. I want to suggest, though, that these *are* very practical sorts of issues, and that part of their practicality has to do with law, with the ways in which legal institutions, practices, and forms of consciousness are involved in “connecting” the universe of meanings and the material world.

Consider again some troubling cases. The situation either makes radically different kinds of sense to different people or the situation presents at least the possibility of not making sense at all, of being practically senseless. Consider situations that we will encounter in this book. A child is born with a severe neurologic disease. Is it an act of God, the punishment for sinning? Is it the result of a mistranscription on chromosome number seven? Is it the result of negligent prenatal genetic screening or counseling? Is it the luck of the draw? Is it meaningless? Do we leave it at that? Who decides? An adult child picks up a steak knife at dinner and plunges it into his father’s chest. Is he evil? Is the act attributable to a shortage of monoamine oxidase A (MAOA) in his neurocircuitry? Is it the result of insufficient care by his psychiatrist? Is it the luck of the draw? Is it meaningless? Do we leave it at that? Again, who decides? A man sneaks into his neighbor’s barn, turns a tub upside down, loosens his pants, and has intercourse with a cow. Is he evil? depraved? Did he commit the abominable and detestable crime against nature or is he suffering from zoophilia? Do we punish him, try to cure him, tolerate him, or regard him with indifference? Was this act meaningful? meaningless? Do we leave it at that? Who decides? Put yourself in the position of deciding, of judging. From this perspective the problems that “nature” may be called upon to resolve – and the problems that *that* solution might give rise to – may be very practical indeed.

The semantic ambiguity of “nature” touches on or gives expression to deep normative ambivalence. As I mentioned, looked at from within the culture as a whole or looked at across various contexts we may both renounce, repudiate, or attempt to obliterate what we call “nature” or we may value, endorse, or seek to protect it. But this broader cultural ambivalence is both unbalanced and unevenly distributed. What we

might call the dominant position is that which seeks to dominate, domesticate, or control nature. This, indeed, is what many take to be a core feature of modernity and of the Enlightenment world view. As such, among its central practical expressions are the organized institutional projects of science, technology, and medicine. Arrayed around this dominant position are various counterpositions which valorize nature or which are founded on a refutation of the nature/human distinction as it has been inherited. I will return to this below. Given the prominence of the science–technology complex to the current social order, an important feature of the *actual* “general situation” is the fact or feeling of continual material and normative revolutions. We exist in a state of continuous radical novelty. In these situations neither “meaning” nor normative significance are as clear as day.

Clearly, “nature” – and the capacity of some humans to intervene in what had been regarded as “natural” – is not what it used to be. Some of the situations that ordinary people find themselves in would have been until very recently unimaginable or fantastic. Yet, they come to life through concepts and frameworks inherited from the past. The amazing thing, I suppose, is that our inherited conceptions of “nature” and “human” work as well as they do. But, at least sometimes, they seem to break down. In situations like those just mentioned, “meaning” and our capacity to *make* meaning seems on the brink of disintegration or collapse. “Nature,” the meaning(s) of nature, and its utility in helping us understand the world is more than ever an issue. So, then, is what it means to be human. The sort of radical naturalization allegedly associated with biotechnologies and neuroscience, for example, is cause for deep anxiety for some precisely because the inherited oppositional structure of the categories “nature” and “human” seems to entail that any “naturalization” will be a form of “dehumanization.”

On the other hand, in some circles of social thought the present moment is one of radical denaturalizations. “Nature,” regarded foremost as a category and the images that give that category content, is increasingly seen as a social, political, and historical artifact. It is something that is made and unmade in practice. Nature is less a pregiven immediacy than a position in a representational system. It does not consist of the preexisting objects and relationships that science discovers and studies from an objective, disengaged position. Rather, “nature,” according to these arguments, is an ideologically saturated notion that is inscribed on aspects of reality to render them meaningful in particular, partial, and not disinterested ways. Often, the argument goes, the effect is to

render what is so inscribed suitable for domination. I shall return to these themes in subsequent chapters. We shall see that “the nature question” is a *practical one* that comes up in countless actual situations. In at least some situations the possibility arises that the “nature” that has been bequeathed to us by our past is disintegrating. As flexible or indeterminate as the concept is, it cannot accomplish what we are asking of it as easily as it once could. In particular, a denaturalized “nature” teeters on the brink of meaninglessness.

We are living at a moment when some see both the disappearance or “death” of nature and the disintegration or deconstruction of “nature.” We are also, perhaps as a response, living during a time of the most intense *politicization* of nature. We are witnessing and participating in passionate social conflicts along a number of dimensions all of which center on the nature question. Environmentalism and antienvironmentalism, pro- and antianimal liberation movements, and multidimensional body politics concerning sexuality, reproduction, genetics, science, and anti-scientism define the political era. And again, if nature is such a fervent political issue then, by definition, so is humanness.

The politics of nature (that is, normative contests centered on questions of physicality) often takes the form of the politics of “nature” (rhetorical, discursive contests over the sorts of meanings we pour into “nature”). They concern the sorts of conceptual-ideological work we want “nature” to do, the sorts of meanings we want to project onto the world and onto ourselves. In the politics of “nature,” whether it takes the form of wilderness preservation, arguments against animal rights, regulation of cloning or any of its many other manifestations, situated social actors work on the meanings of “nature.” They exploit elements of polysemy and ambiguity in efforts to make the world meaningful *one way rather than another*, in order to direct concrete transformations in material, social, and experiential reality by their narratives. Again, the nature question touches directly on the most practical of social and political issues.

But if the nature question is not just a metaphysical conundrum, neither is it simply an umbrella for a disparate number of ideological disputes. As my illustrations so far have demonstrated, troubles arise. People get hurt or violated in various and significant ways. When trouble occurs something else has to happen in response. The child of a collapsed surrogacy arrangement has to be raised by someone; the prisoner will be executed or not; the extraordinary medical expenses of a child with Tay-Sachs or cystic fibrosis will have to be borne by

someone; a wilderness area either will or will not be opened up to mineral extraction; a criminal defendant who offers an exculpatory biological defense will either be found blameworthy and worthy of punishment or she will not be. Practically speaking, “nothing” is not an option. This, then, is the practical situation of nature–human entanglements. These are not simply metaphysical puzzles. What *does* happen will, as a practical matter, be a consequence of how these events are made meaningful. And how they are made meaningful – that is, which among a range of competing meanings is deemed the *controlling* meaning – is, in part, a consequence of how these metaphysical-cum-ideological issues are provisionally decided, of what sorts of nature stories are accepted as the right stories.

### MAKING SENSE WITH NATURE IN LAW

As I suggested earlier, one common response within the current social order is to translate these nature troubles into legal disputes. Here, in this form of nature politics, actors engage formal state institutions through professional intermediaries. Lawyers, among their other specialized tasks and skills, redescribe events or states of affairs in the operative terms of legal discourse such as rights, obligations, authority, and so on. In this way they engage the normative authority and/or coercive capacity of the law or organized state. This may or may not be a tactical component of a developed political strategy. In many cases, a state actor such as an administrative agency, a local prosecutor, or a prison official may be one of the principal participants.

The shift into the cultural domain of “the law” is significant for a number of reasons. It is significant, of course, for how the events unfold. It is also significant for law itself. As I shall be discussing in more detail below, a turn toward a legal resolution of troubles with nature effects a translation or recasting of what the troubles are fundamentally about. For example, a dispute about endangered species is transformed into one about the relationship between congressional statutes and administrative regulation, or a conflict about excessive beach erosion into one about the conception of property held by the framers. Law is not simply a forum for the resolution of disputes, and legal discourse is not simply one filter among others for making sense of events. Law, as a complex of institutional, state-centered practices, has its own constitutive institutional concerns and commitments that may dramatically affect how the troubles it deals with are treated. Moreover, the very

idea of “modern” law – regarded as a core feature of modernity – is itself constituted vis-à-vis particular understandings of nature, of humanness, and of their relationship. This will be the principal theme of chapters 4 and 5. Of more immediate concern, when troubles with nature are brought to the legal arena, participants are not only involved in “making sense,” or in making events meaningful, but in making them *legally* meaningful. This may be done with practice-specific materials and forms such as those provided by doctrines and forms of property, contract, tort, criminal law, or constitutional law. They are at work on conferring specifically legal sorts of meaning onto events and thus into the world. These practices are constrained by how the institutional practices – the tasks, the materials, the styles and structures of authority and so on – themselves are understood.

What we can see when we study the documentary products of these practices (such as briefs and judicial opinions) are the efforts to work on “meanings” of various sorts. In the cases I examine, because the contexts are by definition adversarial and because the underlying troubles are made intelligible by reference to “nature,” we shall see disputants telling contending nature stories in order to shape legal meanings, in order to direct legal power. They bring representations of nature to bear on legal form and form to bear on nature.

This, then, is one of the main tasks of this book: to provide some conceptual tools for interpreting the specific events whereby representations of “nature” are infused with state power to effect material and experiential transformations. My aim is to contribute to an understanding of how we make, unmake, and remake our world with “nature” in law. An examination of the politics of “nature” in law reveals that once “nature” is so thoroughly and irrevocably politicized – that is to say, denaturalized – then reliance on inherited depoliticized notions of nature to make sense of the world are bound to fail. One of the fundamental political uses of nature talk is to effect a depoliticization of some state of affairs or practice. Nature talk is frequently used to confer objectivity or neutrality on institutional practices or to locate some aspect of a situation beyond the bounds of change. In many cases, to engage in nature talk is to practice the politics of depoliticization. But if “nature” is seen to be an irreducibly political concept, then the politics of depoliticization in science, in law, and in everyday life will be more difficult to sustain.

The argument goes deeper, though, than a description of the politics of nature as brought to law. It begins to converge on questions of

the politics of law per se. As I mentioned above, modern law – and now my focus is more specifically on American judicial practices – regarded as a domain of cultural practice, is constituted by its own internal commitments and preoccupations no less than, say, baseball, mortuary science, or jazz. The practical activity of judging is distinguished from other interpretive practices by, among other things, its assumed constitutive tasks. Among these we might include the realization of justice, the maintenance of order or institutional integrity, and commitment to the idea of the Rule of Law. This last concerns the notion that judicial decisions must be made in accordance with norms of neutrality and consistency. Within mainstream legal theory the possibility of the Rule of Law, that is to say, the plausibility that law is something other than simply politics by other means, has been a central preoccupation. This depoliticization of law is a perennial problem within jurisprudence but it is potentially solvable by many different routes. Speaking schematically, the problem is how to insure that the processes and products of judicial practice are sufficiently neutral and objective so as to bear the weight of legitimacy. One aspect of the problem concerns the indeterminacy of legal meaning. If a multitude of plausible answers can be generated in response to a legal question, how are judges to find the determinate answer such that the decision can plausibly be portrayed as being necessitated by “law” rather than as simply the outcome of subjective or ideological choice? That is, how can the outcome and the obligations that flow from it be “legal” and not “political”?

One dimension of the answer concerns what might be called methods of legal reasoning but which I shall call *styles* of judicial reasoning. For heuristic purposes I shall argue that common styles can be arranged along a continuum described by the polar positions of “formalism” and “realism.” By formalism I mean, as a first approximation, a style of judicial presentation characterized by the relative preponderance of attention to word meaning, concepts, categories, doctrines, and their interrelationships. By realism I mean a style in which relatively greater attention is given to “facts” or claims about what the world is like and how it “really” works. Pure expressions of either may be hard to find. All legal rulings are “formalistic” almost by definition and “facts” play some significant role in nearly every opinion. Nevertheless, the continuum is wide enough for different texts to be located at different nonadjacent points. Some are highly formalistic and read almost like term papers in analytic philosophy, while others may read like term papers in sociology or even like pieces of journalism.

With respect to the nature problem, more “realistic” opinions might selectively incorporate scientific representations of nature – that is, claims about how the physical world works – in order to achieve the appearance of objectivity. This serves to stabilize legal indeterminacy and thus provide a ground for neutrality and legitimacy. That is, judges might turn toward “nature” in order to solve an “internal” political problem. More “formalist” styles of presentation, to the extent that the argument structure stays close to questions of “meaning” and shies away from claims about what the physical world is like, can be read as performatively repudiating “nature.” But this too is a response to the same political predicament. This question of style will be addressed at greater length in subsequent chapters. The immediate point is that within each mode of argumentation – and between them – we can see replicated at the level of rhetorical performance core features of the underlying problem of how best to understand the relationship between “nature” and “human.” To put it simply for the present purposes, realism can be seen as a style that appropriates “nature” as a ground of objectivity and constraint *in order to* make determinate articulations of law possible, while formalism can be seen as a style that performatively repudiates “nature” (or authoritative appeals to “nature”) *so as to* demonstrate or enact the primacy of meaning over matter, in order to maintain the autonomy, authority, and normativity of law.

In a sense, this question of style is derivative of another very different sort of political problem reflecting the ambivalent relationship between law and science as key cultural domains from within which meaning is mapped to the world. To the extent that the institutional locations of “law” and “science” align with the human–nature poles of the underlying dichotomization, this too can be seen as replicating the underlying problematic at the level of institutional configuration. The point here is that “the nature problem” and “the human problem” are not and cannot be, after all, “external” problems that are brought to law for resolution. Rather, when the sorts of troubles with or about “nature” are repositioned within the legal field of reference they are translated and transformed. However, given the institutional configurations, internal commitments, and stylistic constraints, they retain their basic shape. That is to say, far from being external to law, the underlying problem – the nature problem – may be *constitutive of the very idea of law*, of the historical genealogy of legal practices and of the politics of law vis-à-vis the legitimacy of legal violence. The events we call “cases,” then, might be seen as occasions for culturally powerful social actors to render, rehearse,

or revise representations of “nature,” of “humanness,” and of law itself. They are occasions for self-portraiture rendering law as the very emblem of human distinctiveness and paradigmatic of the primacy of reason or mind over matter, order over disorder, normativity over “brute” facticity. At the level of content, specific stories are told about nature, humans, their differences and relationships. At the level of style or presentation, *how* legal meaning is made may be both a practice-specific manifestation of the underlying problem and a ritualistic or symbolic resolution of that problem. Through the imposition of “form” on what may appear as formlessness, and of meaning on potential meaninglessness, law recreates the conditions of its own possibility. Again, this is not simply talk. Given the location of law at the intersection of representational circuits and circuits of physical force, the texts in question serve as justifications for channeling the circulation of power through the material world, through landscapes, and onto, through, or away from the bodies of animals and humans.

We are now no longer simply talking about the politics of nature but also the politics of law per se and how the former is shaped, conditioned, and perhaps distorted by the internal anxieties of the latter. But then, perhaps it makes sense to see the politics of law as, in some sense or in some situations, an instance of a broader politics of nature. Law, this argument might go, both needs and fears “nature” as it both needs some objective determination of meaning and fears the specter of determinism that would call its own meaning-making and norm-conferring powers into question. Stylistically, it is both attracted to and repelled by naturalism. Institutionally, it is both attracted and repelled by science and its characteristically materialist, determinist renderings of the world. Cases in which nature is an issue simply bring the prongs of this contradiction into sharper focus. Given the broader (but unbalanced) cultural ambivalences about what is called “nature,” given the radical ambiguities of the concept, and given the sociological complexities of contemporary American legal institutional practices, it is not surprising that some actors will be more attentive to one side of the contradiction and others to the other.

## THE PLAN OF THE BOOK

The remainder of Part I consists of four chapters. The overarching trajectory is from a general discussion of some of the conceptual-rhetorical-political tasks that “nature” is commonly called upon to



accomplish to a more specific discussion of these themes in connection with the practice of judging in American legal contests.

Chapter 2 surveys some of the more prominent and significant things that “nature” does in the modern, Western, or American cultural imagination. These include the projection of negativity and necessity onto what are rendered as objects and the contrastive grounding of “subjects” that nature talk enables. I also briefly look at how relations between “the natural,” “the human,” and their surrogates are commonly construed in terms of knowledge, control, and limits.

Chapter 3 begins to explore these themes in connection with the cultural domain of science. Science is, among other things, an authoritative source of representations of nature – or natural facts. These representations are put into broader circulation and, more particularly, may be selectively incorporated into legal determinations of reality. The work that they do there in providing objectivity and neutrality to legal utterances is significant. This is not least because they may help to stabilize legal meaning and confer the appearance of objectivity and neutrality on the claims of legal actors. That is, authoritative representations of nature may be useful in projects to depoliticize legal practice.

In chapter 4 I shift the focus more explicitly to the historical relationship between nature talk and the law idea. In many ways the very idea of law, like that of “human,” is parasitic on contrastive conceptions of nature. Looked at from a different angle, though, images of law have been important in prominent cultural representations of the distinction between nature and humanity. Law as *nomos*, for example, has historically been contrasted with *physis* or the realm of nature. Legal imagery has played a particularly fecund role in various narratives accounting for the *emergence* of the human *from* the natural. In stories about progress, development, civilization, and socialization, law is frequently cast by social theorists as that which marks the break, and therefore, that which makes humans distinctively *human*. As such, law is commonly figured as antinature, and it is this opposition to nature that makes law *law*. However, notwithstanding this dominant construal of the relationship between the legal and the natural, there have also been prominent readings of law as an *expression* of nature and nature as the aspiration of law. The most prominent example is the natural law tradition. We might say that law is both repelled by and attracted to nature. This abiding, albeit unbalanced, ambivalence, I suggest, is simply a

domain-specific occurrence of a larger cultural ambivalence. It is also a function of the fundamental ambiguity and polysemy that characterizes nature talk more generally and makes it so serviceable for a number of otherwise incompatible uses.

Chapter 5 moves from general considerations of the law idea to the theme of legal practice. I argue that modern, American legal thought is inherently “humanistic” in a number of important senses. As such it cannot be neutral with respect to at least some renderings of “nature” and the nature/human dichotomy. The nature problem, for law, reveals itself on a practical level in consideration of problems of determinist renderings of the legal subject and the indeterminacy of legal meaning. In the interpretation of the situation of legal practice that I offer, the nature problem becomes an internal political problem. The various solutions to the problem that nature causes for legal practice may exhibit the same repulsion–attraction tension that I noted above. Moreover, they may take the form of essentially stylistic or aesthetic approaches to the task of judging as seen through a contrast between more “formalist” and more “realist” modes of adjudication. In the final sections of this chapter I briefly note some of the commonalities and tensions between law and science as authoritative ways of knowing and constructing reality.

Part II consists of a series of nine more specific, topical interpretive essays. Each examines a different context in which troubles with nature arise and are brought to judges for authoritative resolution. Topically, the series is organized along a continuum beginning with what is conventionally regarded as “external” or “exclusive” nature (forces of nature, wilderness), through troubles with animality (wild: endangered species; captive: vivisection; domestic: bestiality), corporeality (reproductive technologies, prenatal genetic screening, biological defenses in criminal law), and, lastly, challenges to the brain/mind version of the nature/human distinction (involuntary administration of psychotropic drugs to inmates).

Each essay includes some contextualizing discussion. This often emphasizes contending political-normative framings of the underlying issue. Each also includes a discussion of the relevant legal forms (property, tort, contract, criminal law, and so on) that are used to make specifically *legal* sense of matters (and minds). But again, this is not a unidirectional relationship. In the structure of judgment we see the staging of an encounter between specific representations and specific

legal forms. Judgments are presented as the assessment of the fit or lack of fit between rival representations and the forms (or counterforms). Determinations are made that the forms can or cannot accommodate the proffered representations, that making them fit will or will not result in legal deformation – that is, the collapse of the conceptual structures that are generative of legal meanings. Each essay also includes interpretive illustrations from cases. These essays are by no means intended to be comprehensive surveys of the issues, much less authoritative statements of “the law” on each point. They are simply illustrative examples of the situation of making sense of nature *in* law and of using “nature” in the process of rendering self-portraits *of* law.

While each essay may fruitfully be read independently of the rest, their fuller significance is made clear through reading the sequence. When moving from one site to the next we pivot, shift perspective, and look at a common topic or theme from a very different angle. Shifting from legal treatments of endangered species to animal experimentation, for example, we look at a very different way of making animals make sense. Shifting from bestiality to reproductive technologies we see the relationship between sex and reproduction in very different lights. Shifting from questions about prenatal genetic screening to genetic defenses in criminal cases we encounter different readings of “the gene.” Each essay, then, is set within the whole and derives its interest partly from the play of juxtapositions. As one reads through the sequence one may be struck most by the astonishing utility of nature talk and the amazing agility of legal interpreters – or by the radical incoherence of nature talk and the futility of making it cohere. Both responses, I feel, are warranted.

Two other general trends are worth noting. First, as we move along the continuum, questions of science and technology become more salient. This is to say that questions about knowledge, its production, distribution, and circulation come more to the fore. This, again, raises questions about the relationship between law and science under conditions of radical material transformation. Second, once our continuum has breached “the species barrier” and begins to look at the naturalization and denaturalization of human subjects, practical questions and disputes about how and where to draw the line become sharper. The fundamental distinction becomes increasingly more problematic, perhaps to the point of collapse. I look at how situated actors respond to this by reinscribing the subject with rights – or not.

Part III is a brief concluding essay which returns to some of the themes raised in the present chapter as seen through the intervening chapters. As with Guglielmi's body – and, I might add, the eel's – I situate the situation of law at the intersection of circuits of meaning and circuits of physical force. I end by asking what it might mean to consider the physicality of law.